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ISMAIL ZAKARIA

v.

PP

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HIGH COURT MALAYA, KUALA LUMPUR
SURAYA OTHMAN J
[CRIMINAL APPLICATION NO: 44-11-2008]
25 MAY 2009

C ***CIVIL PROCEDURE:*** *Judge - Judge to recuse herself - Judical bias - Allegation of - Real danger of bias test - Whether applicant demonstrated existence of real likelihood of biasness - Whether reversing order of trial judge tantamount to abuse of court process - Whether judge best person to hear case - Whether notice of motion dismissed*

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This notice of motion was filed by the applicant for the following orders (i) that the order of the presiding Sessions Court judge, Puan Khadijah Idris dismissing the applicant's application that she recuse herself from continuing to hear and determine the case be
E hereby set aside; (ii) that the said presiding Sessions Court judge in all the abovementioned cases recuse herself from continuing to hear and determine all further proceedings in the said cases and (iii) that the order calling for the defence of the applicant by Puan Khadijah Idris in all the above cases be hereby set aside. The
F applicant, a chief executive officer of a bank faced four charges under s. 65(1) of the Banking and Financial Institution Act 1989 (BAFIA) for acting outside the scope of the terms and conditions imposed on him by the licensed institution by giving credit facilities to Everise Capital Sdn Bhd for the purchase of shares contrary
G to the purpose for which the credit facility was approved by the board of directors of Sime Bank Bhd. He also faced four alternative charges for criminal breach of trust under s. 409 of the Penal Code. The applicant was first charged at the Sessions Court before the Sessions Court judge, Puan Khadijah Idris. The
H trial continued before the said judge until she was transferred to the Economic Planning Unit (EPU) at the Prime Minister's Department as a legal advisor. Puan Khadijah Idris was then appointed as treasury solicitor in the Ministry of Finance. On the date of continued hearing, the defence objected to Puan Khadijah
I Idris continuing hearing the case on the basis that she was the treasury solicitor and as such she should recuse herself from further hearing the case. Puan Khadijah Idris dismissed the application for recusal. Based on that dismissal, the defence then

filed this notice of motion before the honourable court. The applicant's objection to Puan Khadijah Idris continuing presiding over his case was due to his fear that he may not get a fair and impartial hearing when the defence case was heard by the said judge. It was contended by the applicant that Puan Khadijah Idris, being the treasury solicitor, was required to provide legal advisory services to the Ministry of Finance and give advise to the Minister and Central Bank of Malaysia on the interpretation of the laws under the Finance Ministry and Central Bank, which made her unsuitable to continue presiding as a judge in this case. The applicant further contended that Puan Khadijah Idris's role as a treasury solicitor, being the legal advisor from the Attorney General's Chamber to the Ministry of Finance on central banking laws including BAFIA and her required independent role as a Sessions Court judge was incompatible. Hence, the learned judge should not continue or remain as the arbiter in this criminal case as this may prejudice his fair and impartial trial. Lastly, it was the applicant's belief that the present position of the learned judge made it highly undesirable that she continue to hear his case as there was a danger of bias.

Held (dismissing notice of motion):

(1) The correct test to be applied in dealing with the issue of judicial bias is the real danger of bias test laid down by the apex court in the case of *Mohamed Ezam* and *Dato' Tan Heng Chew*. The applicant herein failed to probe that there was any real danger of bias on the part of the learned judge if she was to continue hearing this trial to the end. Clearly the applicant had even failed to demonstrate the existence of a real likelihood of biasness. The position of Puan Khadijah Idris as treasury solicitor did not in any way put her in a position of bias since the duties of a treasury solicitor are totally different from that of a prosecuting officer. A treasury solicitor handles only policy matters at the Ministry level. Although she may from time to time advise on the interpretation of laws, including BAFIA, she was still not involved in the evaluation of evidence for the purpose of prosecution. Such duties lay with the Prosecution Department of Bank Negara which in turn gets direction directly from the officers in the Prosecution Department from the Attorney General's Chambers. As such, it was too remote to conclude that Puan Khadijah Idris was in a position of bias by virtue of her being a treasury solicitor.

A Therefore, in the circumstances, this court should not exercise its revisionary powers in this case as there were no cogent reasons for it to do so. (paras 54, 55 & 57)

(2) As for the application by the applicant for this court to set B aside the order of the learned trial judge for the accused to enter his defence, there were no merits whatsoever. This was so since this court was not seized of the facts and evidence of this case and to reverse the order of the trial judge may tantamount to an abuse of process of this court. It was also C premature at this juncture to make a finding or conclusion that the trial judge had already rejected the accused defence as the accused had yet to commence to make his defence. Puan Khadijah Idris could still reevaluate the case in totality after the defence had presented its case. This was her duty to do D so. Therefore the allegation that she had rejected the defence of the applicant before even hearing it was premature and misconceived. (paras 58 & 59)

(3) Based on all the above findings, the trial judge, Puan Khadijah E Idris, was the best person to continue to hear this case. She had heard this case from the beginning. She had seen and heard all the prosecution's witnesses and she should be allowed to resume to hear the accused's defence and make a decision at the conclusion of that defence. As averred to F earlier, her position as treasury solicitor would not cause a real danger of bias on her part as her duties as a treasury solicitor and her duties as a Sessions Court judge were different and did not put her in a position of conflict. In the circumstances, the notice of motion was dismissed. The order made by Puan G Khadijah Idris not to recuse herself was correct. There was no real danger of bias on her part. This case was therefore reverted back to the Sessions Court for Puan Khadijah Idris to resume the case until its conclusion. (para 60)

Case(s) referred to:

H *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC* ***(refd)***

Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 CA ***(refd)***

Locabail (UK) Ltd v. Bayfield Properties [2000] 1 All ER 65 ***(refd)***

I *Majlis Perbandaran Pulau Pinang v. Syarikat Berkerja-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC* ***(refd)***

Maleb Su v. PP [1984] 1 CLJ 378; [1984] 2 CLJ (Rep) 232 HC ***(refd)***

Metropolitan Properties Co (FGC) Ltd v. Lannon [1969] 1 QB 577 ***(refd)***

Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(refd)***
Mukhtar Abdul Rahman v. PP, Federal Court Criminal Appeal No. 07-1-2008 (Unreported) ***(refd)***
Pinochet Ugarte (No 2) [1999] 1 All ER 577 ***(refd)***
PP v. Kulasingam [1974] 1 LNS 118 HC ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, s. 65(1)
Courts of Judicature Act 1964, ss. 31, 35
Criminal Procedure Code, ss. 261, 323, 325
Penal Code, s. 409

For the applicant/accused - Dato' V Sithambaram (Dato' K Kumaraendran with him); M/s Sitham & Asocc
For the prosecution - Dato' Azmi Ariffin (Ahmad Fairuz Zainal Abidin DPP)

Reported by Suhainah Wahiduddin

JUDGMENT

Suraya Othman J:

[1] This notice of motion was filed by the applicant/accused in the original case for the following orders:

(i) that the order of the presiding Sessions Court judge, Puan Khadijah Idris made on 6 February 2008 dismissing the applicant/accused's application that she recuse herself from continuing to hear and determine Arrest Case No. 62-54-99, 62-55-99, 62-56-99 and 62-57-99 be hereby set aside;

(ii) that Puan Khadijah Idris, presiding as Sessions Court judge in all the above mentioned cases do forthwith recuse herself from continuing to hear and determine all further proceedings in the said cases;

(iii) that the order calling for the defence of the applicant/accused by Puan Khadijah Idris in all the above cases be hereby set aside and the case continue before the present Sessions Court judge under s. 261 of the Criminal Procedure Code;

(iv) alternatively that the hearing and determination of all further proceedings in the above cases continue before the present Sessions Court judge pursuant to s. 261 of the Criminal Procedure Code; and

A (v) further and other reliefs or orders as this honourable court deems fit and proper.

Grounds Of Application

B **[2]** The reasons or grounds of this application as stated in the said notice of motion are as follows:

(a) that Puan Khadijah Idris at the time when she delivered this honourable court's decision calling for the applicant/accused to enter his defence on all the four principal charges under the C Banking and Financial Institution Act 1989, is the treasury solicitor;

(b) that as treasury solicitor, Puan Khadijah Idris is required to provide legal advisory services to the Ministry of Finance and D advising the said Ministry on the interpretation of laws under the Ministry's jurisdiction which include laws pertaining to the Central Bank of Malaysia ie, the Banking and Financial Institution Act 1989;

E (c) that Puan Khadijah Idris's dual role as treasury solicitor and Sessions Court judge are incompatible and will cause embarrassment; and

(d) that the recusal of Puan Khadijah Idris from continuing to hear and determine this case, would ensure the complete F impartiality of the proceedings before the court without any danger of bias and preserve the integrity and sanctity of the proceedings against the applicant/accused.

[3] This application is supported by an affidavit filed by the G applicant.

Facts Of The Case

[4] The brief facts which led to this application before me are as follows:

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[5] The applicant, a Chief Executive Officer of a bank faced four charges under s. 65(1) of the Banking and Financial Institution Act 1989 (BAFIA) for acting outside the scope of the terms and conditions imposed on him by the licensed institution by giving I credit facilities to Everise Capital Sdn Bhd for the purchase of shares contrary to the purpose for which the credit facility was approved by the Board of Directors of Sime Bank Bhd. The board had approved the loan towards repayment of losses

incurred by a related company. He also faced four alternative charges for criminal breach of trust under s. 409 of the Penal Code (F.M.S. Cap 45). A

[6] The applicant/accused was first charged at the Sessions Court of Kuala Lumpur on 30 April 1999 and the first date of hearing was on 15 February 2000 before the learned Sessions Court judge, Puan Khadijah Idris. B

[7] The trial continued before the said judge until 14 September 2001 when she was transferred to the Economic Planning Unit (EPU) at the Prime Minister's Department as a Legal Advisor. C

[8] Based on the application made by the accused counsel, the Chief Judge of Malaya on 17 April 2003 allowed the said judge to continue hearing the case. D

[9] On 2 December 2004, the prosecution closed its case. While both parties filed their respective submissions in court, Puan Khadijah Idris was then appointed as treasury solicitor in the Ministry of Finance on 1 June 2007. E

[10] On 2 August 2007, the accused was called to enter his defence. The defence applied for a written judgment and the judge agreed to the request. Dates were then fixed for the continued hearing of the defence case.

[11] On the date of continued hearing on 28 January 2008, the defence objected to Puan Khadijah Idris continuing hearing the case on the basis that she is the treasury solicitor and as such she should recuse herself from further hearing the case. The said judge then instructed the defence to file in a written application for recusal. F G

[12] On 6 February 2008, Puan Khadijah Idris dismissed the application for recusal. Based on that dismissal, the defence then filed this notice of motion before this honourable court.

[13] The applicant/accused's objection to Puan Khatijah Idris continuing presiding over his case was due to his fear that he may not get a fair and impartial hearing when the defence case is heard by the said judge. It's the applicant/accused's belief that Puan Khadijah Idris, being an officer of the Attorney General's Chamber serving under the right Honourable Attorney General, who H I

A sanctioned the prosecution, is in a position of conflict as the duties of a judge presiding in a criminal case and that of an officer subordinate to the Attorney-General, who in his capacity is also the Public Prosecutor, are different and totally irreconcilable.

B **[14]** It was also contended by the applicant/accused that Puan Khadijah Idris being the treasury solicitor is required to provide legal advisory services to the Ministry of Finance and give advise to the Minister and Central Bank of Malaysia on the interpretation of the laws under the Finance Ministry and Central Bank. This C fact makes her unsuitable to continue presiding as a judge in this case.

[15] The applicant/accused further contended that Puan Khadijah Idris's role as treasury solicitor, being the legal advisor from the D Attorney General's Chamber to the Ministry of Finance on Central Banking laws including BAFIA and her required independent role as a Sessions Court judge are incompatible. Hence, the learned judge should not continue or remain as the arbiter in this criminal case as this may prejudice his fair and E impartial trial.

[16] Lastly, the applicant/accused wish to leave this court with the feeling that he has received a fair and impartial trial. The present position of the learned judge makes it highly undesirable that she continues to hear his case as there is a danger of bias. F

Issue To Be Decided

[17] Therefore, the main issue for this honourable court to decide is whether Puan Khadijah Idris's dual role as treasury solicitor and G Sessions Court judge will give rise to a real danger of bias on her part not to act fairly or impartially in the trial of the applicant/ accused. If the answer is in the affirmative, then she cannot continue hearing the case but must recuse herself. If the answer is in the negative, then she will have to continue hearing the case till the end of the trial and give her decision. H

Revisionary Powers Of The High Court

[18] Sections 31 and 35 of the Courts of Judicature Act 1964 (Act 91) ("CJA 1964") bestow on the High Court the powers of I revision and supervision in respect of criminal proceedings and matters in subordinate courts. Sections 31 and 35 state:

Revision of criminal proceedings of subordinate courts

31. The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.

General supervisory and revisionary jurisdiction of High Court

35. (1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its won motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.

(2) Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter or proceeding in question shall be stayed pending further order of the High Court.

[19] This revisionary and supervisory powers of this High Court is further explained in the Criminal Procedure Code (F.M.S. Cap 6) ("CPC") in ss. 323 and 325 of the Code. Sections 323 and 325 state:

323. Powers to call for records of subordinate Courts

(1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.

325. Powers of Judge on revision

(1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by ss. 311, 315, 316 and 317 of this Code.

A (2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorise a judge to convert a finding of acquittal into one of conviction.

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[20] It is clear from the above provisions that the purpose of revision is for a judge to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings in the C subordinate court.

[21] This power is clearly explained in the case of *Public Prosecutor v. Kulasingam* [1974] 1 LNS 118 HC which states that:

> The powers of the High Court in revision are amply provided D under section 325 of the Criminal Procedure Code subject only to sub-section (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision, the main E question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.

[22] So based on the above legal preposition, it is the duty of this court to examine whether by dismissing the application of the F learned defence counsel for her to recuse herself from continuing presiding over the case, Puan Khadijah Idris has done something which comes within the ambit of the revisionary powers of this court ie, her ruling is incorrect, illegal, improper or irregular as according to the laws applicable.

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[23] If the answer to the above question is in the affirmative, then this revision would be allowed and the trial at the subordinate court will have to be continued by another sessions judge under s. 261 of the CPC. If not, Puan Khatijah Idris would H then have to continue presiding over this case until the end of the trial.

The Law Regarding Issue Of Bias

[24] I shall begin with the legal definition of judicial bias as I defined by *'Black's Law Dictionary'* 7th edn by Bryan A Garner. According to Black, judicial bias means:

> Bias that a judge developes during a trial. Judicial bias is usually insufficient to justify disqualifying a judge from presiding over a case. To justify disqualification or recusal, the judge's bias usually must be personal or based on some extrajudicial reason.

[25] The word bias is also defined by the 'Oxford Companion to Law' which states that:

> Bias is an inclination to decide an issue influenced by any consideration other than its merits.

[26] We shall now move to the legal aspect of the issue of bias. What is the test that this court should apply before recusal is allowed.

[27] It is crystal clear from the decision of the Federal Court through the case of *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701, that the test for recusal is a 'real danger of bias' test.

[28] The learned Federal Court judges in this case discussed various English and Malaysian cases with regard to the issue of bias.

[29] Mohammad Dzaiddin CJ (as he then was) at p. 705 held that:

> In England, the courts applied the 'real danger of bias test' in a criminal case. In *R v. Gough* [1993] AC 646, the House of Lords rejected the reasonable suspicion test. Lord Goff, after examining the authorities in details, reformulated the real danger test as follows.
>
> Having ascertained the relevant circumstances, the court should ask itself whether having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration.
>
> His Lordship also made it clear that this was the test to apply in all cases of apparent bias, whether concerned with justices or other members of inferior tribunals or with jurors or with arbitrators.

[30] In *ex parts Pinochet Ugarte (No. 2)* [1999] 1 All ER 577, the House of Lords considered *R v. Gough*. In the course of his judgment, the presiding judge, Lord Browne Wilkinson, referred to

A the conflict of judicial opinion as to correct test to apply when apparent bias is alleged and left open the question whether the test in *R v. Gough* needs to be reviewed.

[31] In *Locabail (UK) LTd v. Bayfield Properties* [2000] 1 All ER
B 65, the English Court of Appeal applied the *R v. Gough*'s test and stated that the court must ask itself whether'... in the circumstances of the case ... it appears that there was a real likelihood, in the sense of a real possibility of bias ...' It is further held that in answering this question the court must take into
C account the actual facts as disclosed by the evidence and in particular, what it was the judge knew at the time the case was being heard.

[32] In Malaysia, the court in *Majlis Perbandaran Pulau Pinang v. Syarikat Berkerja-sama Serbaguna Sungai Gelugor dengan Tanggungan*
D [1999] 3 CLJ 65, followed the 'real danger of bias' test as expounded in Gough as this, according to the judge, will avoid setting aside of judgment upon quite insubstantial grounds and the flimsiest pretexts of bias.

E **[33]** The judgment of Lord Denning in the case of *Metropolitan Properties Co. (F.G.C) Ltd v. Lannon* [1969] 1 QB 577 illustrates a different concept of judicial bias and the test that should be applied. His Lordship stated:

F > A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a 'direct pecuniary interest' in the subject matter. Second, 'bias' in favour of one side or against the other.
>
> So far as 'pecuniary interest' is concerned, I agree with the
G Divisional Court that there is no evidence that Mr John Lannon had any direct pecuniary interest in the suit.
>
> So far as bias is concerned, it was acknowledge that there was no actual bias on the part of Mr Lannon and no want of good faith. But it was said that there was, *albeit* unconscious, a real
H likelihood of bias. This is a matter on which the law is not altogether clear: but I start with the oft-repeated saying of the Lord Hewart C.J in *R v. Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256,' it is not merely of some importance that justice should not only be done, but should manifestly and undoubtedly
I be seen to be done.
>
> In *R v. Barnsley Licencing Justices, ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 Q.B 167, Devlin J appears to have limited that principle considerably, but I would

> stand by it. It brings home this point: in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever he may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case maybe, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did in fact favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking "The judge was bias".

[34] The above English position was adopted by our Malaysian court. The Court of Appeal in the case of *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin* [1995] 2 CLJ 900, had this to observe:

> To disqualify a judge, there must be circumstances or facts which have been shown to exist which would lead a reasonable and fair-minded onlooker or which would have given reasonable ground for him to suspect that the case would not be decided according to the evidence.

[35] It is therefore clear from these two cases, (*Metropolitan Properties Co* and *Hock Hua Bank*), that to decide on whether there is bias, 'surmise or conjecture' is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the judge would, or did, favour one side unfairly at the expense of the other. It is not on the judge, or even the applicant point of view but from the reasonable and fair-minded onlooker.

[36] The question then to be asked is what is the test to be applied regarding biasness. There seem to be two conflicting decisions on the test to be used; one based on the real danger of bias test and the other on a reasonable and fair minded on looker test. By virtue of the doctrine of "stare decisis", this court will

A have to abide by the higher courts decision. This is important to ensure the uniformity of the living laws and principles applicable in our country.

[37] In the case of *Dato' Tan Heng Chew v. Tan Kim Hoe* [2006] B 1 CLJ 577, Federal Court while dismissing the appeal held that:

> The Court of Appeal is bound by the doctrine of stare decisis to follow the real danger of bias test for recusal adopted by the Federal Court in Majlis Perbandaran Pulau Pinang and Mohamed Ezam. It is axiomatic to state that the doctrine of stare decisis C has become the cornerstone of the common law system practiced in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability. Until such time that the Federal Court holds otherwise, the test of 'real danger of bias' for recusal will remain entrenched and binding on all inferior courts including the Court of Appeal. D

Conflicting Position Of The Trial Judge

[38] It is the basis of this application that Puan Khadijah Idris being an officer of the Attorney General's Chamber serving under E the Attorney General who sanctioned the prosecution of the accused is in a position of conflict because the duties of a judge presiding over in a criminal case and that of an officer subordinate to the Attorney General are different.

F **[39]** The issue became more crucial when at the time she delivered her decision at the end of the prosecution's case, calling for the applicant's to enter his defence, she was the treasury solicitor ie, Legal Adviser to the Ministry of Finance. The applicant was charged under BAFIA which comes under the purview of the G Ministry of Finance.

[40] A similar issue was brought before the Federal Court in *Mukhtar Abdul Rahman v. Public Prosecutor*, Federal Court Criminal Appeal No. 07-1-2008.

H **[41]** The brief facts of this case are as follows:

[42] The defence had applied to the magistrate to recuse herself because she was a deputy public prosecutor in the Anti-Corruption Agency when she heard the defence case. Hence, the I defence contended that it was not appropriate for her to continue presiding over the case. The magistrate refused to recuse herself. The matter was taken on revision to the Alor Star High Court. The High Court agreed that there was no necessity for the

magistrate to recuse herself and that she can continue to hear the case despite the fact that she is now a deputy public prosecutor in the State of Penang. The defence then appealed to the Court of Appeal who dismissed the appeal. The case then went to the Federal Court for final decision.

[43] The Federal Court headed by the Chief Justice, Abdul Hamid Mohamad held that the transfer of officers between the two services is part of the continuous legal education that the officers in the judicial and legal service are exposed to and found no merits in the application. The appeal was subsequently dismissed and the decisions of the High Court and Court of Appeal were affirmed.

[44] After carefully examining the facts that arose in *Mukhtar*'s case, I cannot but agree with the submission of the respondent that the constellation of factors in that case are more compelling for the applicant to succeed and for the trial magistrate to recuse herself.

[45] The facts are:

(i) the presiding magistrate is currently an officer of the Attorney General's Chambers;

(ii) the presiding magistrate is currently a deputy public prosecutor in the State of Penang;

(iii) the presiding magistrate was a deputy public prosecutor in the Anti-Corruption Agency when she heard the defence case; and

(iv) the charge faced by the applicant is corruption in nature.

[46] Despite all the above facts, the Federal Court affirmed the decision of all the courts below by rejecting the application for recusal.

[47] Therefore *Mukhtar*'s case concluded that holding a dual role or position; one as an officer in the Attorney General's Chambers and the other as a magistrate (or in this case a sessions court judge), does not automatically disqualify or put a person in a position of conflict from continuing hearing or presiding over a case which was begun when he or she was a judicial officer.

[48] It would seem that what is more important here is whether there is any real danger of bias on the part of the presiding officer if he or she is to continue hearing the case. This is the paramount consideration for the court to consider.

Finding Of This Court

[49] It's the decision of this court that the correct test to be applied in dealing with the issue of judicial bias is the real danger of bias test which was laid down by the apex court in the case of *Mohamed Ezam* and *Dato' Tan Heng Chew (supra)*.

[50] The other tests which the defence relied on, which was earlier applied in the case of *Hock Hua Bank* ie, "a reasonable and fair minded onlooker which is akin to the "reasonable suspicion" test or a real likelihood or real possibility of bias test are not the correct tests to be applied.

[51] The "reasonable suspicion" test was rejected by the House of Lords in *R v. Gough* which was subsequently followed in the Malaysian case of *Majlis Perbandaran Pulau Pinang v. Syarikat Berkerja-sama Serbaguna Sungai Gelugor dengan Tanggungan* as well as the Federal court cases of *Mohd Ezam v. Ketua Polis Negara* and *Dato' Tan Heng Chew v. Tan Kim Hor*. In the said cases, the court applied the "real danger of bias' test, as explained by Lord Goff in *R v. Gough*:

> Furthermore, I think **it is unnecessary**, in formulating the appropriate test, *to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer* in court at the relevant time. (Emphasis added)

[52] Lord Goff, in *R v. Gough*, also said that the court should ask itself whether, having regard to the relevant circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question. Therefore, it is not the mind of a reasonable and fair-minded onlooker or the applicant that will decide whether there is a real danger of bias but the court. This is so since the court personifies the reasonable man and the court has first to ascertain the relevant circumstances from the available evidence which knowledge is not available to an observer in court ("a reasonable and fair-minded onlooker).

[53] Furthermore, in *Locabail Ltd v. Bayfield Properties (supra)*, the English Court of Appeal applied the *R v. Gough* test that"... the court must take into account the actual facts as disclosed by the evidence and, in particular, **what it was that the judge knew** at the time the case was being heard" [Emphasis added] in considering the question of biasness on the part of the trial judge.

[54] Therefore having considered the facts and authorities submitted by counsels for the applicant, my finding is that the applicant fails to prove that there is any real danger of bias on the part of the learned judge if she is to continue to hear this trial to the end. Clearly the applicant has even failed to demonstrate the existence of a real likelihood of biasness (even though the test is a real danger of biasness test).

[55] The fact as it stands is that the position of Puan Khadijah Idris as treasury solicitor does not in any way put her in a position of bias since the duties of a treasury solicitor is totally different from that of a prosecuting officer. A treasury solicitor handles only policy matters at the Ministry level. Although she may from time to time advise on the interpretation of laws, including BAFIA, she is still not involved in the evaluation of evidence for the purpose of prosecution. Such duties lie with the Prosecution Department of Bank Negara which in turn gets direction directly from the officers in the Prosecution Department from the Attorney General's Chambers. As such, it is too remote to conclude that Puan Khadijah Idris is in a position of bias by virtue of her being a treasury solicitor. As laid down in *R v. Gough*, the House of Lord rejected the reasonable suspicion test and reformulated the real danger test as explained above in this judgment.

[56] Furthermore the decision of the Federal Court in *Mukhtar Abdul Rahman* has clearly given direction to all the courts below in dealing with the issue of judicial bias involving judicial and legal service officer. The wisdom in this decision must surely be due to the strict test of alleging such bias to exist.

[57] Therefore in the circumstances, this court should not exercise its revisionary powers in this case as there are no cogent reasons for it to do so. This application cannot operate as an appeal. As stated in *Maleb bin Su v. Public Prosecutor* [1984] 1 CLJ 378; [1984] 2 CLJ (Rep) 232, the refusal or dismissal of an application to disqualify a judge is not appealable since it does not

finally dispose of the rights of the accused person. Therefore, it cannot be circumvented by applying to the court for a revision of the order made.

[58] As to the application by the applicant for this court to set aside the order of the learned trial judge for the accused to enter his defence, I found it without merits whatsoever. This is so since this court is not seized of the facts and evidence of this case and to reverse the order of the trial judge may tantamount to an abuse of process of this court.

[59] It is also premature at this juncture to make a finding or conclusion that the learned trial judge has already rejected the accused defence as the accused has yet to commence to make his defence. Puan Khadijah Idris can still reevaluate the case in totality after the defence has presented its case. This is her duty to do so. Therefore the allegation that she had rejected the defence of the applicant/accused before even hearing it is premature and misconceived.

[60] As such, based on all the above findings, the trial judge, Puan Khadijah Idris is the best person to continue to hear this case. She has heard this case from the beginning. She has seen and heard all the prosecution's witnesses and she should be allowed to resume to hear the accused's defence and make a decision at the conclusion of that defence. As averred to earlier, her position as treasury solicitor would not cause a real danger of bias on her part as her duties as a treasury solicitor and her duties as a Sessions Court judge are different and does not put her in a position of conflict.

[61] In the circumstances, the notice of motion is duly dismissed. The order made by Puan Khadijah Idris not to recuse herself is correct. There is no real danger of bias on her part. This case is therefore reverted back to the Sessions Court for Puan Khadijah Idris to resume the case until its conclusion.

[62] Notice of motion dismissed.